No. 83-614

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SECURITIES INDUSTRY ASSOCIATION,

Petitioner,

—v.—

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Respondents' briefs confirm, by what they do *not* dispute, that this Petition should be granted:

First, the Board does not dispute the national significance of its ruling. Anything but "routine" (BAC Br. at 11), the Board's ruling, in the words of its own counsel, is "one of first impression,"[1] permitting bank affiliates to engage in public securities brokerage for the first time in half a century.[2]

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1 Post-Hearing Brief submitted on behalf of the Board to the Administrative Law Judge in these proceedings, p. 53.

2 The importance of the Board's ruling was again underscored by the recent proposal of the Securities and Exchange Commission to require banks entering the securities business to register as broker-dealers for the first time. *See* 48 Fed. Reg. 51930 (Nov. 15, 1983). Adoption of the proposed rule would doubtless mean that banks, in order to avoid direct regulation by the SEC, would increasingly attempt to conduct discount securities brokerage through holding company affiliates, as permitted by the decision below.

Second, respondents do not dispute that banks previously have not been in the business of executing securities trades, the heart of Schwab's discount brokerage business and therefore the determinative activity in this case. Respondents instead refer to bank services such as "the purchase and sale" of stock as an accommodation for their customers (Board Br. at 3) but omit that banks historically passed those orders on to brokers for execution. If banks themselves generally had executed securities trades, that activity would have satisfied the first prong of the *National Courier* test, as a service "banks generally have in fact provided." (15a.) The Board, however, concluded that this test had *not* been satisfied,[3] and it sought instead to authorize the activity only as something "functionally similar" to existing bank activities.

This decision thus reaches substantially beyond *Board of Governors* v. *Investment Co. Institute*, 450 U.S. 46 (1981). The activity there involved was not merely "functionally similar" to banking operations, it *was* a banking activity—one that "for over 50 years banks have performed." (*Id.* at 55.) Nor did this Court follow the same rationale in that case as did the Board here. (Board Br. at 6-7.) Far from authorizing the Board to sanction new "functionally similar" activities, this Court was careful to restrict the Board, upon subsequent applications, to "ensur[ing] that no bank holding company exceeds the bounds of a bank's traditional fiduciary function." (*Id.* at 57.) Yet, the Board here has approved an activity that plainly does exceed "the bounds of a bank's traditional [securities] function."[4]

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3 As the Board put it: "Schwab's activities differ somewhat from the brokerage functions usually performed by banks: Schwab executes orders for the purchase or sale of securities directly, without the assistance of an intervening broker; and executes directly on the exchange orders involving securities listed on such exchanges." (25a.)

The court below also observed "one principal difference between the securities activities of brokerage houses and of banks: brokerage houses trade listed securities, directly on the exchanges, while banks historically have used intervening brokers." (15a-16a.)

4 While the Second Circuit thought it significant that some ~~brokers~~ banks currently "direct" brokers on the method of execution they want used

Third, respondents do not dispute that the Fifth Circuit, in applying Section 4(c)(8) of the Bank Holding Company Act to activities *not* traditionally performed by banks, has required that the proposed activities further banking operations. *Alabama Ass'n of Insurance Agents* v. *Board of Governors*, 533 F.2d 224, 241 (5th Cir. 1976), *cert. denied*, 435 U.S. 904 (1978). Instead, respondents again argue that the Board here merely approved a traditional banking activity and that the Fifth Circuit rationale is therefore inapplicable. (Board Br. at 8-9.) But, as discussed, securities execution concededly is not a traditional banking activity, and accordingly would be prohibited in these circumstances by the Fifth Circuit holding. The decision below is in direct conflict. The Second Circuit, alone, has sanctioned a non-banking activity under Section 4(c)(8) *solely* upon a finding that banks are equipped to perform it, and *regardless* of whether the activity facilitates banking operations.

CONCLUSION

For the foregoing reasons and those in the Petition for Certiorari, this Court should issue a Writ of Certiorari to review the judgment and opinion of the Second Circuit Court of Appeals.

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(16a), it could equally be said that some banks "direct" insurance and/or real estate brokers. Under the Second Circuit's rationale, bank affiliates could therefore also be said to be qualified to open general retail operations in those areas—directly contrary to Congress' fundamental determination to *separate* banking from commerce in general. (SIA Pet. at 11.)

Respectfully submitted,

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